(1)
Supreme Court, U.S.
FILED
992057 JUN 22 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

RICHARD A. COLE, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD A. COLE, M.D.
Pro se
14 Charles Street
Newburyport, MA 01950
Telephone: 978.462.8470

53pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether mandamus should have been granted to compel the Clerk of the Appeals Court to docket an appeal brief in a habeas corpus case which was dismissed for failure to file a brief because of fraud on the court.

2. Whether the Appeals Court should have granted relief because of fraud on the court sua sponte. Or in the alternative, whether the Appeals Court should have investigated the allegations of fraud on the court rather than simply denying mandamus.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS WHY CERTIORARI SHOULD BE GRANTED	9
CONCLUSION	27
APPENDIX	1a

TABLE OF AUTHORITIES

Page

CASES

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 16

Board of Education v. York, 429 F.2d 66 (CA10 1970), cert. den., 401 U.S. 954 (1971) 17

Brown v. Allen, 344 U.S. 443 (1953) 19

DeLouis et al. v. Meek et al., 2 Iowa 55 24

Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985) 13

Field v. United States, 193 F.2d 92 (CA2), cert. den., 342 U.S. 894 (1951) 17

Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969) 10, 14, 15, 18, 19

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 575, 90 L.Ed. 1250, 64 S.Ct. 997 (1944) 21, 22, 25, 26

Kent v. Ricards, 3 Md.Ch. 392 24

Martina Theatre Corp. v. Shine Chain Theaters, Inc., 278 F.2d 798 (CA2) (1960) 23

Mississippi Valley Barge Line Co. v. United States, 273 F.Supp 1 (ED Mo. 1967), summarily aff'd, 389 U.S. 579 (1968) 17

Pearce v. Olney, 20 Conn. 544 (1850) 24

Price v. Johnston, 334 U.S. 266 (1948) 15, 17, 19

Schacht v. United States, 398 U.S. 58, 26 L.Ed.2d 44, 90 S.Ct. 1555 (1970) 14

TABLE OF AUTHORITIES – Continued

Page

Slack v. McDaniel, US Supreme Court, Docket No. 98-6322 (2000) 20

Smith v. Lowry, 1 Johns. (N.Y.) Ch. 320 24

Sprague v. Ticonic National Bank, 307 U.S. 161, 83 L.Ed. 1184, 59 S.Ct. 777 (1939) 21

Stutson v. United States, 516 U.S. 193 (1996) 13

Townsend v. Sain, 372 U.S. 293 (1963) 18, 19

United States v. Haldeman, 181 U.S. App. D.C. 254, 559 F.2d 31, 1 Fed. Rules Evid. Serv. 1203, cert. den., 431 U.S. 933, 53 L.Ed.2d 250, 97 S.Ct. 2641, reh. den., 433 U.S. 916, 53 L.Ed.2d 1103, 97 S.Ct. 2992 (1976) 12

United States v. McHie, 196 F. 586 (ND Ill.1912) 17

United States v. New York Telephone, 434 U.S. 159, 98 S.Ct. 364 (1977) 15, 16, 17

United States v. Throckmorton, 98 U.S. (8 Otto) 61, 25 L.Ed. 93 (1878) 21, 23

Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 90 L.Ed. 1447, 66 S.Ct. 1176 (1946) ...20, 23

Wierich v. DeZoya, 7 Ill. 385 (1845) 24

Wood v. Georgia, 450 U.S. 261, 67 L.Ed.2d 220, 101 S.Ct. 1097 (1981) 13

CONSTITUTION, STATUTES AND RULES

U.S. CONST., Article I, Section 9, Clause 2 .....9, 10

18 U.S.C. § 1512 .....10, 12, 14

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1621 ..... 12, 14

28 U.S.C. § 1254 2

28 U.S.C. § 1651 ..... 2, 14, 15, 16

28 U.S.C. § 2255 ..... *passim*

42 U.S.C. § 1985 ..... 11, 14

Sup. Ct. R. 10.1(a) and (c) 2

TREATISES

Federal Practice and Procedure, Wright, Miller, Kane (Eds.), 1995, § 2870 22

Moore's Federal Practice, volume 7 § 60.33 (1971 ed.) 21

Moore's Federal Practice, volume 12 § 60.81 (1999 ed.) 21

Wells, Res Adjudicata, section 499 24

OPINIONS BELOW

Cole v. U.S.A., USDC WD Pa. Civil Action No. 94-164E (part of Crim. No. 91-28E), July 8, 1994

Cole v. U.S.A., USCA 3rd Docket No. 94-3613, CLERK ORDER, Dec. 30, 1994

Cole v. U.S.A., USCA 3rd Docket No. 94-3613, March 26, 1997

Cole v. U.S.A., USCA 3rd Docket No. 94-3613, May 6, 1997

In Re: Richard A. Cole, USCA 3rd Docket No. 99-4058, May 9, 2000

In Re: Richard A. Cole, USCA 3rd Docket No. 99-4058, June 1, 2000

JURISDICTIONAL STATEMENT

Based on newly discovered evidence of fraud on the court, a petition for a writ of mandamus was filed in the United States Court of Appeals for the Third Circuit at Docket No. 99-4058 seeking to reinstate an appeal which had been dismissed for failure to file an appeal brief. The underlying case was filed in the United States District Court for the Western District of Pennsylvania based on the court's jurisdiction pursuant to 28 U.S.C. § 2255 since it had heard the underlying criminal case, *U.S.A. v. Cole*, USDC WD Pa. Crim. No. 91-28E. The United States Court of Appeals for the Third Circuit rendered its decision by a Clerk Order on December 30, 1994. A motion to recall the mandate was filed on October 18, 1996 which was denied

on March 26, 1997. A petition for rehearing was filed on April 9, 1997 which was denied on May 6, 1997.

The mandamus petition at Docket No. 99-4058 was filed on December 27, 1999 and denied on May 9, 2000. A petition for rehearing and rehearing in banc was denied on June 1, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254 and 1651 and Supreme Court Rule 10.1(a) and (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the dismissal of an appeal of a habeas corpus petition, guaranteed by the United States Constitution, Article I, Section 9, Clause 2, because of fraud on the court. Further, petitioner is entitled to an evidentiary hearing in the District Court pursuant to 28 U.S.C. § 2255 which was never granted in this case. After Petitioner discovered proof of fraud on the court, he sought to have his appeal brief docketed nunc pro tunc by a writ of mandamus pursuant to 28 U.S.C. § 1651, and this was denied by the Third Circuit. The failure to grant relief in the face of fraud on the court is contrary to federal practice as stated in the treatises of Moore's Federal Practice (1999 Edition) and Federal Practice and Procedure (1995 Edition), Wright, Miller, and Kane, Editors. Finally, the Third Circuit refusd to investigate petitioner's allegations of fraud on the court setting a precedent that one may defile the judicial integrity of the Third Circuit with impunity.

STATEMENT OF THE CASE

Richard A. Cole, M.D. petitions this Court for a writ of certiorari in this case on the issue of obtaining a writ of mandamus to compel the Clerk of Court of the United States Court of Appeals for the Third Circuit to docket his appeal brief nunc pro tunc since it was not filed because of fraud on the court. In this manner, Cole will finally have a hearing on the merits of his habeas corpus petition (motion under 28 U.S.C. § 2255, A. 13a) to which he is entitled by law. Cole originally filed his habeas corpus petition on April 22, 1994 in the United States District Court for the Western District of Pennsylvania. It was dismissed without a request for an answer from the government, without an evidentiary hearing, and without an explanation on July 8, 1994. Cole appealed to the United States Court of Appeals for the Third Circuit in Philadelphia on July 25, 1994, but his appeal was not docketed until November 9, 1994. Cole was ordered to file a brief by December 16, 1994. Cole, who was in prison at the time, and did not have the funds to make copies, sent his brief to his sister-in-law, Sylvia Cole, to make copies and send them to the Appeals Court. She has sworn in repeated declarations and affidavits that she did this and filed the necessary brief and copies via Federal Express courier on November 25, 1994. Further, she swore that she called Federal Express to make sure the documents had been delivered. (A. 18a). Inexplicably on January 3, 1995, Cole received notice via Clerk Order (A. 7a) that his appeal had been dismissed for failure to timely prosecute based on Local Rule 107.2 (A. 15a) because Cole had not filed his brief. Cole filed a motion to reinstate the appeal which he sent to Sylvia Cole who swore that she made

the appropriate number of copies and again sent them to the Clerk's Office via Federal Express. She swore that she checked with Federal Express and the Clerk's Office to insure delivery, and both confirmed that the papers had arrived at the Clerk's Office (Affidavit of Sylvia Cole, A. 18a). Nevertheless, the motion to reinstate the appeal was not received.

Cole, a pro se litigant, had no idea what to do next, and so filed a second habeas corpus petition in an attempt to have the merits of his petition heard. This second petition was dismissed because Cole could not bring up the same arguments on a second petition after the first petition had been dismissed. The District Court criticized Cole for failing to prosecute his first appeal. Thereupon Cole filed a motion under Federal Rule of Civil Procedure 60(b) in the United States Court of Appeals for the Third Circuit asking to set aside the judgment dismissing the appeal of the habeas corpus petition, since Cole had shown by declaration of his sister-in-law that she had served the brief and the motion to reinstate the appeal via Federal Express, and that she had spoken to Federal Express and the Clerk's Office, and they both had assured her that all was in order (A. 18a).

Richard Cole had relied on his sister-in-law, Sylvia Cole, and his brother, Steven P. Cole, to act as his mailing agents while Richard Cole was incarcerated (Affidavit of Sylvia Cole, A. 18a, and Affidavit of Steven P. Cole, A. 21a). Richard Cole was unjustly imprisoned and penniless by the time of incarceration. Cole had spent all his money on lawyers. Cole had no money to make copies of pleadings to the Appeals Court. Thus, Cole was forced to seek

help from his family. Sylvia has insisted in many declarations and affidavits, one of which is seen at A. 18a, that she did send in the appeal brief on time, and further that she sent in a motion to reinstate the appeal in a timely manner. Sylvia swore under oath that she sent both packages via Federal Express, and that she called both Federal Express and the Clerk of this Court to insure that each had arrived. Sylvia swore that she confirmed both had arrived, and that she had paid Federal Express via her Discover Card for each service. Richard Cole has relied in good faith upon the word of Sylvia Cole, the wife of his brother and mother of four children, one of whom is Richard's Godchild.

In July of 1999, based on a series of improbable lies, Richard Cole discovered that Sylvia lied about a variety of matters as well as forged a number of documents and withdrawn funds without authorization from a series of bank accounts and brokerage houses. Because of these actions and the fact that the Appeals Court did not accept Cole's explanation of why he did not file a brief, Richard Cole began a more in depth investigation of the facts of this case with regard to the alleged filing of the appeal brief.

When Cole first sought to open this case in 1997 on the advice of a new lawyer, Cole called Federal Express and Discover Card to try to document the shipments and their receipt by the Appeals Court. Each company told Cole that they only had records going back one year. Sylvia insisted that she had no records, but would swear to any document necessary to support her version of the story. Thus Richard Cole has filed many declarations and

affidavits in the Appeals Court in which Sylvia repeatedly testified to the facts as above.

Nonetheless, after the Appeals Court denied Cole's motion to reopen the appeal at Docket No. 94-3613 based on what Cole perceived as a clerical error, and later denied Cole's petition for a writ of mandamus at Docket No. 98-3612, Cole sought to investigate more fully. By chance, in a conversation with the office of the Custodian of Records at Federal Express, Cole learned that if he was a member of a government agency, or if he had a federal subpoena, records could be obtained going back to 1994 and earlier. Sylvia Cole had made other unsubstantiated claims about her activity in 1994 and 1995 which were the subject of a federal lawsuit in Pennsylvania. Here too, Sylvia alleged that she sent material via Federal Express and paid for it with Discover Card. Using the power of these federal subpoenas, Richard Cole found from both Federal Express and Discover Card that Sylvia lied.

Cole subpoenaed Federal Express to confirm the disputed delivery of the two packages to the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania (A. 23a). Not only was there no record of delivery of these two packages, but Federal Express had no record of any delivery to said court in the period of November 15, 1994 through January 15, 1995 (A. 28a). Further, the two airbill numbers in question were used by other companies with no relationship to Cole. Sylvia wrote out an airbill with the address of the Appeals Court, but failed to send it. She didn't do it just once, she did it twice. Then she insisted that not only had they been sent, but that she confirmed this with Federal Express, and paid for each service with Discover Card. Finally, she

stated that she confirmed the second delivery with the Clerk of this Court in January 1995. All this is seen in her affidavit at A. 18a.

Richard Cole thought it possible that perhaps the airbill numbers had been lost to the Federal Express system, or misfiled, so he crossed checked this information with Discover Card through a subpoena. The billing statements showed numerous packages sent via Federal Express, but notably, none of these were sent on the dates in question, November 23, 1994 and January 6, 1995, nor did any of the airbill numbers match. Specifically, the two airbills, nos. 2318346074 and 2318346332, were never billed to Discover Card. Thus in addition to the fact that the Clerk of the Appeals Court denied receiving either of these two packages, there is evidence that Federal Express never delivered them, nor charged for them. Thus we must assume that they were never sent, and that Sylvia Cole is lying. Richard Cole is not sure of why she did this, but this and more recent behavior suggests a serious psychological problem for which she is now being treated.

Cole also sent a subpoena to Bell Atlantic hoping to establish whether or not Sylvia ever called the Clerk of the Appeals Court. However, Bell Atlantic did not keep records going back to 1994-1995. In a recent Opinion supporting a denial of Cole's petition for a writ of mandamus at Docket No. 99-4058, A. 1a, the Appeals Court stated that it could find no telephone records related to a missed filing. Indeed, we now have evidence from Federal Express, Discover Card, and the Appeals Court that Sylvia is lying.

Cole assembled all this material and drafted a petition for a writ of mandamus to compel the Clerk of the Appeals Court to docket the appeal brief since it had not been sent through fraud on the court. Sylvia Cole had acted to "defile the integrity of the court." Richard Cole was totally prevented from presenting his appeal due to the malice of Sylvia Cole.

The appeals court felt that mandamus could only be used to authorize a lower court to do its duty and denied Cole's petition (A. 1a). Cole requested a rehearing and a rehearing en banc which was likewise denied (A. 12a).

In his habeas corpus petition, Cole raised four major issues of constitutional dimension: 1. ineffective assistance of counsel, 2. bias and prejudice of the magistrate who issued the search and seizure warrant as well as the two officers who swore to the affidavit underlying the warrant, 3. documented perjury of one of the officers swearing to the above warrant who lied about her activity with Cole in a related Drug Enforcement Agency hearing, and 4. bias and prejudice of the trial court judge. None of these issues have ever been heard by any court, nor has any evidentiary hearing ever been held on these matters despite the fact that they had not been fully developed in the record of this case.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Petitioner has been foreclosed from an appeal of his denied habeas corpus petition by fraud on the Third Circuit. The jurisprudence of this Court authorizes mandamus to protect the rights of parties.

A habeas corpus petition is a sacred right that the founders of this country sought to insure by providing in the Constitution that the right to habeas corpus would not be suspended except in times of insurrection. U.S. CONST., Article 1, Section 9, Clause 2. The habeas corpus petition is the last resort available to Cole to challenge the constitutional validity of his conviction. Rather than having an appeal of his denied 2255 motion, to which he is entitled by law, Cole has been totally foreclosed from an appeal by the malice of Sylvia Cole. The Clerk dismissed Cole since the brief was not filed. However, Richard Cole did everything in his power to insure that the appeal brief would be filed. Both Richard Cole and the Appeals Court have been defrauded of the right to an appeal in this matter.

Richard Cole has made a prima facie case of obstruction of justice, violation of civil rights, and perjury against Sylvia Cole. Mandamus is an appropriate remedy to docket the appeal brief nunc pro tunc. This Court has repeatedly stated that the writ of habeas corpus must be administered with initiative and flexibility to insure that miscarriages of justice within its reach are surfaced and corrected.

> "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its

> pre-eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended * * * .' U.S. Const., Art. I, s9, cl.2. The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286 at 291, 89 S.Ct. 1082 at 1086, 22 L.Ed.2d 281 (1969).

There can be no doubt that Sylvia and Steven Cole effectively denied Richard Cole access to the Appeals Court. Besides committing a breach of their fiduciary duties, they obstructed justice, denied Cole his civil rights, and Sylvia committed perjury in the affidavit at A. 18a along with many other declarations attesting to the same facts filed in the Appeals Court.

Blocking the transmittal of documents to a federal court constitutes a violation of Title 18, Chapter 73, Obstruction of Justice § 1512, Tampering with a witness, victim, or an informant, where it states,

> " . . .
>
> (b) Whoever knowingly uses intimidation . . . or engages in misleading conduct toward another person, with intent to –
>
> (1) influence, delay or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to –

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; . . . "

Clearly Sylvia and Steven Cole have succeeded in keeping Richard Cole's appeal brief from the Appeals Court and in so doing have changed the course of justice in this case. Richard Cole lost through default, through no fault of his own, but rather due to the scheming of his family members.

Willful blockage of access to the courts of the United States by two or more persons constitutes a violation of 42 U.S.C. § 1985, which states in relevant part,

" . . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

Cole could well sue his brother and sister-in-law for a denial of his civil right to the Appeals Court. This is of little consequence since Cole wants to have his appeal brief docketed rather than seeking money.

Sylvia Cole is guilty of perjury as defined by Title 18, Chapter 79, Perjury § 1621, Perjury generally, where it states,

> "Whoever –
>
> . . .
>
> (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;
> is guilty of perjury, . . . "

All of her allegations have been disproven by facts in the record of this matter before the Appeals Court. Federal Express disproved her version. Discover Card disproved her version. The Clerk of the Appeals Court disproved her version.

While it may be too late to indict Sylvia for obstruction of justice under 18 U.S.C. § 1512, it is not too late to indict her for perjury under 18 U.S.C. § 1621. There is enough evidence presented thus far for a prima facie case of perjury. Under the two witness rule, the testimony of Lance McGlothin from Federal Express and the testimony of Kevin Mason from Discover Card will more than suffice to support the evidence presented to the Appeals Court. *United States v. Haldeman* (1976), 181 U.S. App. DC 254, 559 F.2d 31, 1 Fed. Rules Evid. Serv. 1203, cert. den.,

(1977) 431 U.S. 933, 53 L.Ed.2d 250, 97 S.Ct. 2641, reh. den., (1977) 433 U.S. 916, 53 L.Ed.2d 1103, 97 S.Ct. 2992. In addition, the Clerk of the Appeals Court could testify that the material was never received.

While incarcerated and without money, Richard Cole had no alternative but to turn to someone for help. Had Richard the luxury of time, money, and freedom, he could have hired a competent attorney, or perhaps done the mailing himself. Unfortunately, he was under the thumb of the Government, incarcerated in Alabama. This Court has been solicitous of such predicaments and has recognized that filing limits should be made flexible for those in similar circumstances.

In *Stutson v. United States*, 516 U.S. 193 (1996) at 196, this Court stated,

> "Finally, it is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow technicalities that caused no prejudice to the prosecution to preclude a remand under 28 U.S.C. § 2106 (1988 ed.) 'in the interests of justice.' *Wood v. Georgia*, 450 U.S. 261, 265, n.5. 67 L.Ed.2d 220, 101 S.Ct. 1097 (1981). And procedural accommodations to prisoners are a familiar aspect of our jurisprudence. See, e.g., 287 U.S.C. § 2255 (1988 ed.) (habeas review in spite of an adverse final appellate decision); *Evitts v. Lucey*, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985) (relief for ineffective assistance

> of retained counsel on appeal); *Schacht v. United States*, 398 U.S. 58, 63-64, 26 L.Ed.2d 44, 90 S.Ct. 1555 (1970) (unlike in civil cases, time limits for petitions for certiorari in criminal cases are not jurisdictional).

Richard Cole has a legal right to have his appeal pursuant to 28 U.S.C. § 2255. Cole is petitioning this Court to protect his rights and give him the appeal to which he is entitled by the law of 28 U.S.C. § 2255 which states,

> "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."

Richard Cole was illegally blocked from the Appeals Court by Sylvia Cole, apparently in collusion with Steven Cole, a prima facie violation of 42 U.S.C. § 1985, 18 U.S.C. § 1512, and 18 U.S.C. § 1621. Respectfully, it is hard to understand how the Appeals Court can simply brush Cole off, and hold that Cole's only remedy is from Sylvia Cole (Opinion at Appendix page 1a). Further, the Appeals Court has a special duty in adjudicating Cole's habeas corpus petition as stated by this Court in *Harris v. Nelson*, 394 U.S. 286 at 299,

> "Clearly, in these circumstances, the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651."

Thus this Court mandates that federal courts, including appeals courts, fashion appropriate remedies to do justice.

In the instant matter, Cole petitioned for a writ of mandamus to compel the Clerk of the Appeals Court to docket his appeal nunc pro tunc since this Court and Richard Cole have been defrauded of the right to due process by the malicious acts of Sylvia Cole. Had Sylvia Cole filed the appeal brief on time, on or about November 23, 1994, this matter would have been fully adjudicated. As it now stands, Richard Cole has never had a hearing on his habeas corpus petition in open court.

Most importantly, this Court in *United States v. New York Telephone Co.*, 434 U.S. 159 at 172 stated,

> "The All Writs Act provides: 'The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 U.S.C. § 1651(a) . . .
>
> This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it had previously issued in its exercise of jurisdiction otherwise obtained: 'This statute has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve 'the rational ends of law." *Harris v. Nelson*, 394 U.S. 286, 299 (1969), quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948). Indeed, '[u]nless appropriately confined by Congress, a

> federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.' *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)."

In the original appeal of Cole's denied 2255 motion, Cole was ordered to file his brief on time or face dismissal. Cole thought he complied with the order of the Appeals Court, but in fact, Sylvia maliciously lied about sending the brief. Later she lied about sending the motion to reopen the appeal. Cole has provided subpoenaed documents which support his charges that Sylvia lied, and they have not been challenged. Clearly Sylvia has interfered with and frustrated the orders of the Appeals Court, and has damaged the rights of Richard Cole, a party before the Appeals Court. Moreover, her malice has defrauded the Appeals Court of the opportunity to do justice in this case. This Court went on in *New York Telephone, supra*, p. 173,

> "The Court has consistently applied the Act flexibly in conformity with these principles. Although § 262 of the Judicial Code, the predecessor to § 1651, did not expressly authorize courts, as does § 1651 to issue writs 'appropriate' to the proper exercise of their jurisdiction but only 'necessary' writs, *Adams* held that these supplemental powers are not limited to those situations where it is 'necessary' to issue the writ or order 'in the sense that the court could not otherwise physically discharge its appellate duties.' 317 U.S., at 273."

This Court's holding demands mandamus be used to exercise jurisdiction to protect Richard Cole. In *New York Telephone, supra,* p. 174 this Court continued,

> "The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, *Mississippi Valley Barge Line Co. v. United States,* 273 F.Supp. 1, 6 (ED Mo. 1967) summarily aff'd, 389 U.S. 579 (1968); *Board of Education v. York,* 429 F.2d 66 (CA10 1970), cert. denied, 401 U.S. 954 (1971), and encompasses even those who have not taken any affirmative action to hinder justice. *United States v. McHie,* 196 F. 586 (ND Ill.1912); *Field v. United States,* 193 F.2d 92, 95096 (CA2), cert. denied, 342 U.S. 894 (1951)."

Cole agrees that the Clerk of the Appeals Court is without fault here. However, the Clerk as part of his ministerial duties dismissed Cole's appeal since he did not receive Cole's brief. The failure to file the brief was not Cole's fault and should be corrected. Otherwise, Sylvia's treachery has irrevocably damaged Cole from which he has no source of relief. This Court in *New York Telephone, supra,* at 374 stated,

> "The dissent's attempt to draw a distinction between orders in aid of a court's own duties and jurisdiction and orders designed to better enable a party to effectuate his rights and duties, post, at 189-190 is specious. Courts normally exercise their jurisdiction only in order to protect the legal rights of parties. In *Price v. Johnston,* 334 U.S. 266 (1948), for example, the

> production of a federal prisoner in court was required in order to enable him to effectively present his appeal which the court had jurisdiction to hear. Similarly, in *Harris v. Nelson*, 394 U.S. 286 (1969), discovery was ordered in connection with a habeas corpus proceeding for the purpose of enabling a prisoner adequately to protect his rights."

Cole is petitioning this Court to protect his rights and give him the appeal to which he is entitled by the law of 28 U.S.C. § 2255.

This Court mandates that federal courts, including appeals courts, fashion appropriate remedies to do justice. Cole prosecuting Sylvia Cole will not help Cole get a hearing on his habeas corpus appeal. Rather, it is within the enumerated powers of the Appeals Court to docket the appeal brief in this matter nunc pro tunc. As stated in *Harris v. Nelson, supra,* at 292,

> "There is no higher duty of a court, under our Constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law. This Court has insistently said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: 'The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.' *Townsend v. Sain, supra,* at 312."

The necessity of an appeal is even more pressing in this matter since the District Court summarily dismissed the motion under 28 U.S.C. § 2255 without explanation, without an evidentiary hearing, and without an answer from the government. Most of the issues in the 2255 motion concern ineffective assistance of counsel, and are not in the record. No where in the record does it discuss the bias, prejudice, and perjury of the FBI, DEA, and Pennsylvania State Police, all of which should have been raised by defense counsel. No where is the issue of bias on the part of Magistrate Judge Bifulco and trial Judge Cohill addressed, both of which should have been argued by defense counsel. By the law of 28 U.S.C. § 2255, Cole is guaranteed an evidentiary hearing. He never got one. As stated in *Harris v. Nelson, supra,* at 291,

> "It is now established beyond the reach of reasonable dispute that the federal courts not only may grant evidentiary hearings to applicants, but must do so upon an appropriate showing. *Townsend v. Sain,* 372 U.S. 293, 313 (1963); *Brown v. Allen,* 344 U.S. 443, 464, n.19 (1953). And this Court has emphasized, taking into account the office of the writ and the fact that the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding must not be allowed to founder in a 'procedural morass.' *Price v. Johnston,* 334 U.S. 266, 269 (1948)."

Granted that the Appeals Court may have affirmed Cole's conviction on direct appeal. However, Cole's counsel insisted that there were no matters for appeal, and therefore, raised none except the amount of the fine and/or

restitution. It would be a most unusual case if defense counsel laid out a cause in the record for ineffective assistance of counsel so that a reviewing court could sua sponte declare ineffective assistance of counsel and vacate the judgment. Neither the District Court, nor the Appeals Court have ever addressed the issues raised in the 2255 motion, especially the allegations of ineffective assistance of counsel who failed to provide Cole with a competent defense. Most recently this Court held that habeas petitions dismissed on procedural grounds without looking at the merits should be reinstated, *Slack v. McDaniel*, Docket No. 98-6322 (2000). This Court again condemned the notion that these pleadings filed by prisoners are simply of nuisance value. Remarkably, Cole's lawyer failed him, and Cole's family failed him. Thus far, the justice system has failed him since it is convinced that Cole's conviction should stand regardless of the constitutional and legal violations that made it possible. Cole implores this Court to grant certiorari in this matter.

II. Relief from a judgment procured by fraud on the court is always granted under the jurisprudence of this Court. If the Third Circuit did not believe petitioner's allegations of fraud on their face, it had a duty to petitioner and to the integrity of the court to investigate.

The Appeals Court has inherent authority to investigate the question of fraud on the court in the procurement of this judgment of dismissal. *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 90 L.Ed. 1447, 66 S.Ct. 1176 (1946). If such fraud cannot be ascertained from the pleadings, the Appeals Court had an obligation

to order an adversary proceeding to adjudicate Cole's allegation of fraud on the court. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 88 L.Ed. 1250, 64 S.Ct. 997 (1944); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 83 L.Ed. 1184, 59 S.Ct. 777 (1939); and *United States v. Throckmorton*, 98 U.S. (8 Otto) 61, 25 L.Ed. 93 (1878). Professor Moore at 7 Moore's Federal Practice (1971 ed.) P. 60.33 at 60-361 has characterized fraud on the court as,

> "that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases presented for adjudication."

The most recent edition of Moore's Federal Practice (1999) at volume 12 § 60.81 elaborates on this concept, and sets the stage for this petition, at page 60-225.

> "Although 'fraud on the court' will always support relief from a judgment (*see* § 60.21[4][a]), regardless of whether it is raised by motion, in an independent action, or sua sponte, it is a separate concept from the idea of an independent action in equity for relief from a judgment. . . . If fraud reaches the level of fraud on the court, relief is *always* merited, and no distinction between 'intrinsic' or 'extrinsic' fraud needs to be made. In the ordinary independent suit, only justice between the parties is at issue, in fraud on the court cases, the integrity of the courts is at issue.
>
> Confusing fraud on the court with the standards for ordinary actions in equity blurs several important distinctions between the two concepts: (1) since it is the integrity of judicial

> institutions that is paramount in fraud on the court claims, there is no real time limit on relief for fraud on the court (*see* § 60.22[4][g]) while a simple independent action in equity is always subject to the doctrine of laches (see § 60.83); (2) because the credibility of institutions is protected by the concept of fraud on the court, relief may be had even if the parties who will benefit from relief have 'unclean hands' (*see* § 60.22[4][I]), while a total lack of fault, including clean hands, is a prerequisite or an essential element for relief by way of an independent action in equity (see § 60.82[2])."

Cole's appeal was dismissed for failure to file an appeal brief. Not only was this brief not filed, but this failure was part of a scheme by Sylvia and Steven Cole to defraud Richard Cole of his right to an appeal of his denied motion under 28 U.S.C. § 2255. In so doing, Sylvia and Steven also defrauded the Appeals Court of its right and obligation to do justice.

Courts do not have to wait for a party to raise a motion. According to Federal Practice and Procedure, 1995, Eds. Wright, Miller, Kane, at § 2870, Fraud on the Court,

> "Almost all of the principles that govern a claim of fraud on the court are derivable from the *Hazel-Atlas* case. The power exists in every court. If the fraud was on an appellate court, that court rather than the trial court, should consider the matter. Although a party may bring the matter to the attention of the court, this is not essential, and the court may proceed on its own motion.[13]

> n. 13. Defrauded district court may take action sua sponte to expunge a judgment constituting fraud on the court and anyone, whether his hands are clean or dirty, may suggest that it do so. *Martina Theatre Corp. v. Shine Chain Theaters, Inc.*, C.A.2d, 1960, 278 F.2d 798."

Earlier Cole had petitioned the Appeals Court to docket the appeal based on what he thought was clerical error. Later Cole petitioned for mandamus for the same reason followed by another mandamus petition for fraud on the court. The Appeals Court has denied Cole's mandamus petitions because it felt that mandamus was an inappropriate remedy and offered Cole nothing, not even an investigation into his allegations. The seminal case for having an appeals court investigate fraud in the procurement of a judgment before it came from the Third Circuit in *Universal, supra,* where this Court stated,

> "A Federal Circuit Court of Appeals has inherent power to investigate whether its affirmance of a judgment was obtained by fraud, and may bring before it by appropriate means all those who may be affected by the outcome." *Ibid.* at 575.

In *Universal,* the Appeals Court investigated the question of fraudulent evidence in a scheme to reach a certain judgment. In the instant case, the fraud comes not from a party, but someone who schemed to not only damage a party, but to defraud the Appeals Court of the ability and obligation to do justice.

In *Throckmorton, supra,* this Court discussed the long standing tradition of leaving judgments alone, and cited the exception relevant here,

> "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, – these, and similar cases show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. See Wells, Res Adjudicata, sect. 499; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. DeZoya*, 7 Ill. 385; *Kent v. Ricards*, 3 Md.Ch. 392; *Smith v. Lowry*, 1 Johns. (N.Y.) Ch. 320; *DeLouis et al. v. Meek et al.*, 2 Iowa, 55.
>
> In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court." *Ibid.* at 65.

Sylvia Cole was to have acted on behalf of Richard Cole, and had promised to do so. Sylvia Cole acted in a way analogous to an attorney representing Richard Cole's

interest. In fact she followed her own agenda, and to date has been successful at keeping Richard Cole's appeal from the Appeals Court.

The Appeals Court has commented earlier (Opinion, A. 1a) that perhaps it took too long for Richard Cole to conclude that he had been deceived by Sylvia Cole. Respectfully, the Appeals Court has never been unjustly convicted of crimes it never committed, nor been imprisoned. As a consequence, it has never faced the loss of friends, family, profession, reputation, money, etc. From personal experience, Cole can tell this Court that it has been a lonely journey for the last ten years. Cole found it hard to believe that someone he had helped as a physician and as a friend and family member would betray him. Furthermore, if not for the fortuitous discovery of the power of a federal subpoena, Cole would not have gotten this far. Cole has done as much as a pro se litigant could be expected to do. Furthermore, Sylvia is still within the statute of limitations for perjury which she committed most recently in the affidavit at A. 18a in July 1999.

The holdings of this Court with regard to fraud on the court dismiss the concept of laches since any act which has defiled the system comes into the ambit of the reviewing court as a matter of course, regardless of the time involved. As stated by this Court in *Hazel-Atlas, supra,*

> "Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set

> up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be the preservation of the integrity of the judicial process must always await upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Ibid.* at 246.

According to this Court, the determination of whether fraud on the court has been committed does not reach to the merits of the appeal since the judicial process itself has been defiled. *Hazel-Atlas, supra.* Nonetheless, the courts thus far have repeatedly considered Cole to be the doctor who prescribed methamphetamine and repetition of such falsehoods can be dangerous for the judicial process since we are all only human. Cole therefore reminds this Court, as stated repeatedly in his pleadings, that he has never prescribed methamphetamine, although he was indicted and convicted of same. The rest of the indictment is filled with a similar disregard for the truth.

Cole has a meritorious appeal which needs to be heard.

According to the authority of this Court, Cole deserves relief from fraud on the court. Even if this Court does not accept Cole's allegations, it owes Cole and the integrity of the Courts of the United States the duty to investigate fraud on the court. Therefore, Cole should be granted certiorari in this matter.

CONCLUSION

Cole respectfully requests this Court to grant certiorari in this matter so that he might be granted a writ of mandamus to compel the Clerk of Court of the United States Court of Appeals to docket Cole's appeal brief nunc pro tunc at Docket No. 94-3613. Further, that Court should investigate Cole's allegations of fraud on the court so that justice may be done.

I declare under the penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

RICHARD A. COLE, M.D.
Pro se
Petitioner
14 Charles Street
Newburyport, MA 01950
Tel.978.462.8470

Dated June 13, 2000

APPENDIX TABLE OF CONTENTS

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit denying writ of mandamus 1a

APPENDIX B

Order of the United States District Court for the Western District of Pennsylvania denying habeas corpus petition..... 5a

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit dismissing appeal for failure to prosecute..... 7a

APPENDIX D

Order of the United States Court of Appeals for the Third Circuit denying motions..... 8a

APPENDIX E

Denial of Petition for Rehearing from the United States Court of Appeals for the Third Circuit 10a

APPENDIX F

Order of the United States Court of Appeals for the Third Circuit denying writ of mandamus 11a

APPENDIX G

Denial of Petition for Rehearing from the United States Court of Appeals for the Third Circuit 12a

APPENDIX TABLE OF CONTENTS – Continued

APPENDIX H

28 U.S.C. § 2255 ..... 13a

APPENDIX I

Miscellaneous Local Appellate Rules for United States Court of Appeals for the Third Circuit 15a

APPENDIX J

Docket 99-4058 In Re: Richard A. Cole 17a

APPENDIX K

Affidavit of Sylvia Cole 18a

APPENDIX L

Affidavit of Steven P. Cole 21a

APPENDIX M

Subpoena for documents to Federal Express 23a

APPENDIX N

Response from Federal Express to subpoena 28a

APPENDIX A

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-4058

IN RE: RICHARD A. COLE,
Petitioner

On Petition for a Writ of Mandamus

(Related to W.D.Pa.Crim. No.91-cr-00028E
and C.A.No. 94-3613)

April 27, 2000

Before: SLOVITER, MANSMANN and GREENBERG, *Circuit Judges*

(Filed May 9, 2000)

OPINION

PER CURIAM

Richard A. Cole has filed a mandamus petition seeking an order requiring the Clerk of this Court to treat Cole's brief in his appeal from the denial of his first section 255 motion timely filed. For the following reasons we shall deny his petition.

I.

Cole pled guilty to five counts each of drug distribution and mail fraud, and one count of tax evasion. We affirmed Cole's conviction on appeal, but vacated a restitution award and remanded for partial resentencing. After Cole was resentenced to a new restitution award, he filed a motion pursuant to 28 U.S.C. § 2255. The motion

was denied in July 1994. Cole's appeal was dismissed for failure to file a brief. *United States of America v. Cole*, 94-3613 (3d Cir. December 30, 1994). By now released from prison, in November 1995 Cole filed a second section 255 motion in which he raised the same claims he raised in his first section 2255 motion. Accordingly, the District Court dismissed Cole's motion as successive and we denied his request for a certificate of appealability. *United States of America v. Cole*, C.A.No. 96-3243 (3d Cir.June 27, 1996).

Meanwhile, on October 18, 1996, Cole filed a motion in this Court which was construed as a motion to reopen C.A.No. 94-3613. Cole argued that the dismissal was incorrect. He stated that because he was in prison at the time, his sister-in-law, Sylvia Cole, sent this Court copies of his briefs by Federal Express on November 23, 1994, and that when he received notice that his appeal had been terminated, he called Sylvia and asked her to contact the Court. According to Cole, when she did so "a spokeswoman in the Clerk's office [stated] that the appeal was probably 'accidentally dismissed'" and encouraged Sylvia to file a motion to reopen the appeal. Cole states that he drafted a motion to reopen and gave it to Sylvia who filed it on January 9, 1995. Cole states that the clerk's office informed Sylvia over the telephone that it received the motion to reopen on January 9, 1995. However, the Court's records contain no reference to any documents which could be construed either as his briefs or as a motion to reopen. We denied Cole's motion to reopen as untimely. *United States of America v. Cole*, C.A.No. 94-3613 (February 6, 1997).

In November 23, 1998, Cole filed a mandamus petition in this Court seeking an order requiring the Clerk to file his brief in 94-3613, again arguing that he is entitled to pursue that appeal because he timely filed both his brief and subsequent motion to reopen. Having previously found no merit to these arguments, we denied the petition. *In re: Richard A. Cole*, C.A.No. 98-3612 (3d Cir.March 16, 1999), *reh'g denied* (June 9, 1999), motion to recall the mandate denied (August 12, 1999), *reconsid. denied* (February 24, 2000).

Undeterred, on December 27, 1999, Cole filed a second mandamus petition seeking an order requiring the filing of his brief in 94-3613, this time presenting a new twist to his previous arguments. He now argues that on further investigation he has learned that Sylvia lied to him "about a variety of matters as well as forged a number of documents and withdr[ew] fund without authorization from a variety of bank accounts and brokerage houses." One of the matters about which she allegedly lied was that she sent his briefs and motion to reopen to the Court. He argues that appeal 94-3613 should be reinstated because both he and the Court were defrauded by Sylvia. He also repeats the arguments from his initial section 2255 motion. Among Cole's attachments are affidavits from Sylvia and documents purporting to show that the brief and motion to reopen were not sent by Federal Express.

II.

Even if it were true that Sylvia deceived Cole, and even if it were plausible that it required almost six years

for Cole to discover this fact, we could not grant Cole's petition. Issuance of a writ of mandamus is an appropriate remedy only when it is necessary "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). Cole does not now allege that a court within our jurisdiction has failed to act in accordance with its jurisdiction; the alleged wrongdoing here is Sylvia's, not that of any court or court officer. Accordingly, we shall deny his petition.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD A. COLE, M.D.	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 94-164E
UNITED STATES OF AMERICA,	)	CRIMINAL NO. 91-28E
Defendant	)	

ORDER

AND NOW, to-wit, this 8th day of July, 1994, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Motion to Amend Habeus Corpus Petition (Doc. 141) be and the same hereby is DENIED;

2. Motion to Vacate (Doc. 138) be and the same hereby is DENIED;

3. Motion for Recusal of Judge Cohill under 28 U.S.C. sections 144 and 455 (Doc. 141) be and the same hereby is DENIED;

4. Motion for Recusal of Judge Cohill from All Proceedings (Doc. 141) be and the same hereby is DENIED.

5. Motion to Vacate All Judgments, Orders and Decrees Against Plaintiffs (Doc. 141) be and the same hereby is DENIED.

/s/ Maurice B. Cohill, Jr.
MAURICE B. COHILL, JR.
JUDGE

cc: Richard A. Cole, M.D.
Reg. No. 10509-068
BHM-H FPC Maxwell AFB
Montgomery, AL 36112

Asst. United States Attorney

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3613

USA

vs.

Cole

Richard A. Cole, Appellant

(Western District of Pennsylvania Civil No. 91-cr-00028E)

ORDER

Pursuant to Rule 3(a) of the Federal Rules of Appellate Procedure and Third Circuit LAR Misc. 107.2,

It is ORDERED that the above-entitled case is hereby dismissed for failure to timely prosecute;

It is FURTHER ORDERED that a certified copy of this order be issued forthwith as the mandate.

For the Court,
/s/ Illegible
Acting Clerk

Date: December 30, 1994

cc: Mr. Richard A. Cole

Bonnie R. Schlueter, Esq.

APPENDIX D

February 6, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. *94-3613*

UNITED STATES OF AMERICA

VS.

RICHARD A. COLE, ET AL.

(W.D. PA. CRIM. NO. 91-CR-00028)
(CRIMINAL TREATED AS CIVIL)

Present: GREENBERG, NYGAARD and ROTH, *CIRCUIT JUDGES*

Submitted are:

(1) Appellant's motion to reopen the above-captioned appeal; and

(2) Appellee's "Motion to Expedite Proceedings and Motion for Summary Action"

in the above captioned case.

Respectfully,

/s/ P. Douglas Sisk/WMH

P. DOUGLAS SISK
CLERK

ORDER

The foregoing motion to reopen the above captioned appeal is denied as it was filed untimely. LAR Misc. 107.2(a). The government's motion to expedite and to affirm summarily are denied as moot.

By the Court,
/s/ M.A. Greenberg
M.A. GREENBERG
CIRCUIT JUDGE

Dated March 26, 1997

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 94-3613
UNITED STATES OF AMERICA
vs.
RICHARD A. COLE, ET AL.,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 91-00028)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, *Circuit Judges*

The petition for rehearing filed by the appellant, Richard A. Cole, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for a rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:
/s/ M.A. Greenberg
M.A. GREENBERG
CIRCUIT JUDGE

Dated May 6, 1997

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-4058

IN RE: RICHARD A. COLE,

Petitioner

On Petition for a Writ of Mandamus

Related to W.D.Pa.Crim. No.91-cr-00028E
and C.A.No.94-3613)

April 27, 2000

Before: SLOVITER, MANSMANN and GREENBERG,
Circuit Judges

(Filed May 9, 2000)

JUDGMENT

This cause came to be heard on a petition for a writ of mandamus and was submitted for decision under Rule 21, Fed.R.App.Pro. On consideration whereof, it is now hereby ORDERED AND ADJUDGED by this Court that the petition for a writ of mandamus is denied. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Marcia M. Waldron
Acting Clerk

DATED: May 9, 2000

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 99-4058

IN RE: RICHARD A. COLE,

Petitioner

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, and FUENTES, *Circuit Judges*

The petition for rehearing filed by

Petitioner Richard A. Cole

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service; and no judge who concurred in the decision having asked for a rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ Sloviter
Sloviter
CIRCUIT JUDGE

Dated June 1, 2000

APPENDIX H

Title 28. Section 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeus corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

APPENDIX I

MISCELLANEOUS LOCAL APPELLATE RULES FOR UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LAR MISC. 107.0 SANCTIONS

107.2 Dismissal for Failure to Prosecute.

(a) When an appellant fails to comply with the Federal Rules of Appellate Procedure or the Local Appellate Rules of this Court, the Clerk shall issue written notice to counsel or to the appellant who appears pro se that upon the expiration of fourteen (14) days from the date of the notice, the appeal may be dismissed for want of prosecution unless appellant remedies the deficiency within that time. If the deficiency is not remedied within this period, the Clerk is authorized to dismiss the appeal for want of prosecution and issue a certified copy thereof to the Clerk of the district court as the mandate. The appellant shall not be entitled to remedy the deficiency after the appeal is dismissed except by the order of the Court. A motion to set aside such an order must be justified by the showing of good cause and may not be filed after ten (10) days of the date of dismissal. If the appeal is one taken from the District Court of the Virgin Islands, an additional ten (10) days shall be added to the time limits specified in this paragraph.

(b) Nothwithstanding subsection (a), if an appellant fails to comply with the Federal Rules of Appellate Procedure and the Local Appellate Rules with respect to the timely filing of a brief and appendix, at any time after the seventh day following the due date, the Clerk is authorized to

dismiss the appeal for want of timely prosecution. The procedure to be followed in requesting an order to set aside dismissal of the appeal is the same as that set forth in subsection (a).

APPENDIX J

Proceedings includes all events.
99-4058 In Re: Richard A. Cole

12/28/99	Original Proceeding Docketed. Notice filed by Richard A. Cole. USCA Receipt No. 41499 and Receipt Date 12/28/99 (nmb)
1/3/00	APPEARANCE from Attorney Bonnie R. Schlueter on behalf of Respondent, USA, filed. (nmb)
4/27/00	Submitted on PETITION FOR WRIT OF MANDAMUS. Coram: Sloviter, Mansmann and Greenberg, Circuit Judges. (nmb)
5/9/00	NOT-FOR-PUBLICATION PER CURIAM OPINION (Sloviter, Mansmann and Greenberg, Circuit Judges), filed. Total pages: 4. BPS-12 (nmb)
5/9/00	JUDGMENT, Denied, filed. (nmb)
5/9/00	Certified copy of Judgment sent to Clerk of District Court. (nmb)
5/16/00	PETITION by Petitioner for rehearing en banc, filed. Certificate of service dated 5/15/00. (nmb)
6/1/00	ORDER (Becker, Chief Judge, Sloviter, Authoring Judge, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Barry and Fuentes, Circuit Judges) denying petition for en banc rehearing by Petitioner Richard A. Cole, filed. (nmb)

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RICHARD A. COLE, M.D., Appellant/Petitioner vs. UNITED STATES OF AMERICA, Appellee/Respondent	))))))))	**MANDAMUS ACTION** **Civil Action No. 98-3612** Based on Docket No. 94-3613 from Crim. No. 91-28 Erie **AFFIDAVIT OF SYLVIA COLE**

I, Sylvia Cole, solemnly swear that I am a resident of the Commonwealth of Massachusetts, over the age of eighteen years, have personal knowledge of the facts the facts stated herein, and can testify competently under oath in court to their truth if necessary. I swear under oath that the following facts are true:

1 . . . I served as the mailing agent for my brother-in-law, Richard A. Cole, M.D., during the period of April 20, 1993, to October 5, 1995, while Doctor Cole was incarcerated at Federal Prison Camp, Maxwell Air Force Base, Montgomery, AL. I did so because, while incarcerated, Doctor Cole did not have the necessary funds to make copies, or afford postage to be able to communicate with the Courts of the United States.

2 . . . Thus Doctor Cole would send me material from Maxwell to be copied with instructions as to where, and how to send it.

3 . . . On or about November 22, 1994, I received a packet of material from Doctor Cole containing, but not

limited to, an appellant's brief for his appeal in the United States Court of Appeals for the Third Circuit, Docket No. 94-3613, a motion for an expedited appeal, and a motion for release to his own recognizance. I sent all this material plus my declaration: proof of service by mail to the Clerk of Court, United States Court of Appeals for the Third Circuit, Philadelphia, PA on Wednesday, November 23, 1994, via Federal Express for arrival on Friday, November 25, 1994, since Thursday was Thanksgiving Day. I called Federal Express on Friday, and they assured me that the package was delivered. I have attached a copy of the Federal Express receipt with tracking number of 2318346074. This was billed to my Federal Express Account No. 173808992 which in turn was billed to my Discover Card No. 6011 0013 3151 6320 expiration 04/99.

4 . . . In early January 1995, Doctor Cole called me to tell me that his appeal, Docket No. 94-3613, had been dismissed on December 30, 1994, because of "failure to timely prosecute", and that none of the material I sent had been received. I called the Clerk's Office, and the spokeswoman said that it may have been "the one that was dismissed by accident". I was told that Doctor Cole could simply file a motion to have the dismissal set aside for good cause. I thereupon copied all the material sent earlier. Doctor Cole sent me the motion to set aside this dismissal, and I sent this along with the appellant's brief, motion for an expedited appeal, motion for an expedited appeal, and my declaration: proof of service by mail to the Clerk of Court, U.S. Court of Appeals for the Third Circuit in Philadelphia, PA, via Federal Express on Friday, January 6, 1995, for delivery on Monday, January 9,

1995. Attached is the Federal Express Receipt with tracking number 2318346332 which was likewise billed to my account listed above and then billed to my Discover Card account.

5 . . . I called the Clerk's Office on Monday, January 9, 1995, to see if the material had been delivered, and was assured by the spokeswoman that all was in order. Despite the fact that I sent a request for a date stamped copy of the cover sheet of each of the documents when I sent the material, I never received any date stamped copies. I have attached the Federal Express receipt and tracking number.

I swear under oath and under the penalties of perjury that the foregoing is true and correct.

Dated June 29, 1999 /s/ Sylvia Cole
Sylvia Cole

Commonwealth of Massachusetts
County of Essex

June 29, 1999
SS.

Then personally appeared Sylvia Cole, the above named affiant, who known to me, signed or acknowledged the foregoing affidavit as her free act and deed, before me.

/s/ John F. Moak
John F. Moak
Notary Public
My Commission Expires
October 12, 2001

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RICHARD A. COLE, M.D.,	)	**MANDAMUS ACTION**
	)	**Civil Aciton No. 98-3612**
Appellant/Petitioner	)	Based on Docket No.
	)	94-3613 from Crim. No.
vs.	)	91-28 Erie
	)	
UNITED STATES OF AMERICA,	)	**AFFIDAVIT OF STEVEN P. COLE**
	)	
Appellee/Respondent	)	

I, Steven P. Cole, solemnly swear that I am a resident of the Commonwealth of Massachusetts residing at 8 Hallisey Drive, Newburyport, Massachusetts 01950, over the age of eighteen years, have personal knowledge of the facts the facts stated herein, and can testify competently under oath in court to their truth if necessary. I swear under oath that the following facts are true:

1 . . . I served as the mailing agent for my brother, Richard A. Cole, M.D., during the period of April 20, 1993, to October 5, 1995, while Doctor Cole was incarcerated at Federal Prison Camp, Maxwell Air Force Base, Montgomery, AL. I did so because, while incarcerated, Doctor Cole did not have the necessary funds to make copies, or afford postage to be able to communicate with the Courts of the United States.

2 . . . Thus Doctor Cole would send me material from Maxwell addressed to Mr. & Mrs. Steven P. Cole, 8 Hallisey Drive, Newburyport, MA 01950 to be copied with instructions as to where, and how to send it.

3 . . . I sent many packages via Federal Express on behalf of Richard A. Cole, MD. Each of these was billed to the Federal Express account of Steven P. Cole, 8 Hallisey Drive, Newburyport, MA 01950, account no. 173808992 which in turn was billed to the Discover Card of Steven P. Cole, account no. 6011 0013 3151 6320 expiration 04/99. I personally reviewed the Discover Account monthly statements to make sure each Federal Express package sent for delivery had been billed and thereafter was paid through this Discover Card account. All Federal Express packages sent for Richard A. Cole, MD were billed as above; there were no exceptions.

I swear under oath and under the penalties of perjury that the foregoing is true and correct.

Dated July 11, 1999

/s/ Steven P. Cole
Steven P. Cole

Commonwealth of Massachusetts
County of Essex

July 11, 1999
SS.

Then personally appeared Steven P. Cole, the above named affiant, who known to me, signed or acknowledged the foregoing affidavit as his free act and deed, before me.

/s/ John J. Quinn, Jr.
John J. Quinn, Jr.
Notary Public
My Commission Expires
July 5, 2000

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Richard A. Cole, MD, Plaintiff, vs. Pennsylvania Blue Shield, Hammermill Paper Co., Lakeview Forge, Warren State Hospital, and employee benefit programs to be identified and named later, Defendants	)))))))))))	C.A. No. 98-92 Erie

SUBPOENA TO PRODUCE DOCUMENTS OR THINGS FOR DISCOVERY PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 45

To: Lance McGlothin, Records Custodian
Federal Express Legal Dept.
1980 Nonconnah Blvd.
Memphis, TN 38132

Within twenty (20) days after the service of this subpoena, you are ordered by the court to produce the following documents or things: **proof of service of the following two packages allegedly billed to account no. 173808992, Steven P. Cole, 8 Hallisey Drive, Newburyport, MA 01950, airbill no. 2318346074 sent on or about November 23, 1994 to U.S. Court of Appeals, Philadephia, PA and airbill no. 2318346332 billed to the same account and sent to the same place on or about January 6, 1995. Copies of these two airbills are**

attached. Kindly confirm that you will research both the airbill number and dates of shipment from November 15, 1994 through January 15, 1995. Please provide a copy of the "Customer Detail Screen" for this account.

Please send to Richard A. Cole, 14 Charles Street, Newburyport, MA 01950 within twenty (20) days of service of this subpoena.

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

This subpoena was issued at the request of the following person: Richard A. Cole, 14 Charles Street, Newburyport, MA 01950, Tel.978.462.8470, Plaintiff pro se.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for a deposition, hearing or trial.

(B) Subject to paragraph d(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause

(c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to an undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

By the Court:
/s/ James A. Drash
James A. Drash

Clerk, Civil Division

Date: July 16, 1999

Seal of the Court

APPENDIX N

Federal Express Corporation
1980 Nonconnah Boulevard
Memphis, TN 3812

U.S. Mail: PO Box 727
Memphis, TN 38194-1842

Telephone 901-395-3382

FexEx

Federal Express

VIA OVERNIGHT LETTER

July 28, 1999

Mr. Richard Cole
14 Charles Street
Newburyport, MA 01950

RE: Subpoena Response - #98 92 Erie - FEC File # 16892

Dear Mr. Cole:

Our research department found no documents of deliveries to the address listed on the above referenced subpoena during the time period of 11/15/94 thru 01/15/95.

Sincerely,

FEDERAL EXPRESS CORPORATION

/s/ Lance McGlothin
Lance McGlothin
Records Custodian

901-395-3320

Fax # 901-395-5861